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Supreme Court
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 37

D. DEL VECCHIO, TRADING AS PEOPLES HARDWARE STORES AND MERCHANTS MUTUAL CASUALTY COMPANY, A CORPORATION,

Petitioners,

vs.

BONNIE L. BOWERS.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

CHAPIN B. BAUMAN,
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Attorneys for Respondent.

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Petitioners,

vs.

BONNIE L. BOWERS.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia, appears on the record, pp. 168-171.

Jurisdiction.

The judgment sought to be reviewed was entered March 11th, 1935 (R. 171). The Petition for Writ of Certiorari was filed May 1, 1935. Petitioner invokes the jurisdiction of the court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925. (28 U. S. C. Sec. 347, 43 Stat. 938.)

Statute Involved.

Tit. 33 U. S. C. Sec. 920 (Longshoremen's and Harbor Workers' Compensation Act, made applicable to the District of Columbia, 45 Stat. 600):

> "In any proceedings for the enforcement of a claim for compensation under this chapter it shall be presumed in the absence of substantial evidence to the contrary . . .
>
> (D) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

Question Presented.

The substance of the question petitioners present is:

Did the facts presented before the Deputy Commissioner on behalf of the petitioners overcome the presumption of accidental death of respondent's decedent?

The answer to this question is a matter of law solely.

The Court of Appeals decided that there was no "substantial evidence" presented before the Deputy Commissioner sufficient to overcome the presumption that respondent's decedent did not kill himself.

This is in accordance with the decision of this Court in *Int. Com. Comm.* v. *L. & R. R.*, 227 U. S. 88, 92, where the Court held that findings of fact by that Commission could be set aside when:

> "for any reason, the order is contrary to law."

The case at bar does not differ from the principles asserted in *Crowell* v. *Benson*, 285 U. S. 22.

The Court of Appeals took action similar to that of the case at bar in *New Amsterdam Cas. Co.* v. *Hoage*, 61 App. D. C. 306, 308 and this Court denied a Writ of Certiorari, 288 U. S. 608.

Respondent submits that petitioner has failed to state adequate reasons for granting the Petition under the standard set forth in Rule 38, Sec. 5 (c) of this Court.

The above statute involved a re-enactment of the common law. Respondent believes that an examination of the facts in the light of cases cited by petitioners will disclose that, except as any case will present facts differing in minor respects from the facts of cases previously decided, this case does not present any question which has not been settled by decision of this Court; nor is it an instance of failure on the part of the Court of Appeals to give proper effect to any applicable decision of this Court.

Statement of the Case.

Bonnie L. Bowers, respondent, filed a bill for mandatory injunction to set aside a denial of an award of compensation for the death of her husband (R. 1-10). The defendants were Robert J. Hoage, Deputy Commissioner, and the petitioners, D. Del Vecchio, trading as Peoples Hardware Stores, the deceased's employer and the Merchants Mutual Casualty Company, the employer's insurer.

The petitioners filed a Motion to Dismiss the bill (R. 10, 22), which was granted (R. 164). From the decree dismissing the bill respondent appealed, and the case was reversed and remanded.

This case was before the Court of Appeals once before—*Del Vecchio et al. v. Bowers*, 62 App. D. C. 327. In that case, the Court decided that deceased met his death in the course of his employment, but remanded the case to the Deputy Commissioner for a Finding on the question of whether or not the deceased met his death by accident or suicide. That judgment has become final.

The only question before the Court of Appeals and before this Court was and is—Did the facts presented by the peti-

tioners overcome the presumption of accidental death? That is purely a question of law.

When this case came before the Deputy Commissioner after the opinion of the Court of Appeals in *Del Vecchio et al.* v. *Bowers, supra*, the Deputy Commissioner took no further testimony, but considered only the testimony that had been before him in the prior hearing, as it appears in the stenographic transcript of the testimony set forth in the transcript of record in this case. (Such transcript is the same as appeared in the Record in *Del Vecchio et al.* v. *Bowers, supra*, No. 5809.)

The Deputy Commissioner found "That the employee, Jeff Bowers (respondent's deceased husband), * * * came to his death by a gun shot wound of the chest by his own hand, as a result of willful intent on his part to injure or kill himself, and that said injury and death, therefore, while arising in the course of his employment, did not arise out of the employment; that in accordance with Section 3(b) of the Act, no compensation is payable" (R. 6-7).

It was the contention of respondent that there was no evidence before the Deputy Commissioner on which such a finding could be based.

Respondent asked the Court of Appeals to decide whether the presumption against suicide, both statutory and common law, accompanied by the evidence offered by appellant was overcome by "substantial" evidence offered by the employer and insurer who "controverted" their liability for compensation and asserted that deceased was a suicide.

The lower court based its judgment on both the bill of complaint and the testimony before the Deputy Commissioner. It therefore is necessary to advise this Court of such testimony.

Jeff Bowers, deceased, left surviving him a widow, Bonnie L. Bowers, respondent, and an infant son, one year and

seven months of age (R. 26-27). The deceased, an employee of Peoples Hardware Stores was paid $30.00 per week and commission. His income for the year preceding his death was $1,783.86, an average of $4.30 per week commission (R. 25).

Mr. Bowers was found dead at 10:15 A. M. on September 15th, 1931, with a gun shot wound in his chest, about two inches above the heart, at the store of which he was manager, located at 1311 Seventh Street, N. W.

Mrs. Bonnie L. Bowers, on behalf of herself as claimant, testified that she was the widow of Jeff Bowers. She and Mr. Bowers resided at 3203 Perry Street, Mt. Ranier, Maryland (R. 42). Mr. Bowers was employed at 1311 Seventh Street, N. W. (R. 43). When Mr. Bowers first went to work at the Seventh Street store he took a pistol with him and kept it there. The state of his health immediately before death was good (R. 45). On the morning of his death, Mr. Bowers ate his breakfast as usual. He had not been complaining of anything, and had had no financial worries. "We did not have anything like that and we did not have any debts we could not pay; we had enough to cover expenses" (R. 46). "He did not owe any debts but the car and Doctor. There was $20.00 on my Doctor's bill." The payments on the car were $36.00 per month (R. 48), and a balance of $140.00 was owed (R. 46). The rent of the home was $25.00 per month, and that was paid to date. The Doctor's bill and the automobile payments constituted the entire indebtedness of decedent (R. 46-47).

A letter written by Mr. Bowers was admitted in evidence. The letter was dated September 9th, 1931, the day before Mr. Bowers' death. It had been mailed on the morning of Mr. Bowers' death, according to the post mark on the envelope (R. 142). The letter was as follows (R. 143):

"Wednesday night, Sept. 9th, 1931.

DEAR MOTHER:

Will try and answer your letter received before you left Mich. Guess you thought I wasn't going to answer, but I haven't been feeling so good. Sure hope these few lines will find you well. This leaves us very well. How did you make your trip back home? Fine, I hope. How are the rest of the family? By now, fine, though, I guess. Sure was glad to hear, Annie, Jim and Jessie's baby was almost well. Hope he will continue to improve. Albert is fine and mean as ever and his eyes swell up but is now better. How are times down there? Well, though, I guess. Sure hope you enjoy your trip to Mich. Was very sorry I didn't get to go up there while you was there. I didn't see hardly how we could drive over those mountains. Sure got me last year when we went to Akron. Guess you feel better since you got back home. How did you like Dan? You wrote and asked me what I thought of them. I think they both are nice men. I like them both. Dan looks like a kid to me. Excuse me for not writing sooner. Won't wait so long next time. Answer soon in long letter. May God bless you, from

Jeff, Bonnie, Albert."

MR. BENJAMIN A. DUNN testified that he was a brother of Mrs. Bowers and worked for Mr. Del Vecchio, who traded as Peoples Hardware Stores (R. 48). He had worked at the Seventh Street Store where Mr. Bowers was found dead and kept a gun there constantly, because the neighborhood was dangerous (R. 49). He knew Mr. Bowers intimately and saw him frequently. His disposition was cheerful. Witness' family and deceased's family visited each other. Mr. and Mrs. Bowers' domestic relations were all right (R. 50-51). They seemed "jolly, loving and affectionate", Mr. Bowers was "always the life of the party anywhere we were". This was true up to the time of his death, there was no change. Mr. Bowers had money in the bank and owed a little on his automobile.

He "had more money in the bank that would take to cover any of his indebtedness. I know the exact amount he had in the bank. I know it was several hundred dollars (R. 51). Witness knew Mr. Bowers had trouble with his ear but never heard deceased make any complaint about it (R. 52).

Mr. Hiram Kent Dunn, a brother of Mrs. Bowers, stated that he also worked for Mr. Del Vecchio and with Mr. Bowers at the Seventh Street Store (R. 55). Mr. Dunn "always thought he (Mr. Bowers) was always jolly; he did not seem like he was worried about anything". Mr. Bowers never seemed melancholy or despondent; he and his wife got along all right (R. 57). The gun that was found at the time Mr. Bowers was shot was his gun. It was kept in a holster in the drawer most of the time. Mr. Dunn was the first person to open the drawer where the gun was found (R. 58). It was out of the holster (R. 59). The store had a counter and an aisle back of it for the clerks. The drawer where the gun was found was near the cash register (R. 60), and right underneath the counter (R. 61). The muzzle of the gun was pointing toward the aisle which the clerks used. The drawer was a usual drawer found beneath a counter and at the rear of the store (R. 61). There were a couple of drops of blood in the drawer (R. 62).

Mr. John Hoffman knew Mr. Bowers for 1½ years before his death. Around 10:00 or 10:15 A. M. of the day of Mr. Bowers' death, he went into the Seventh Street Store to inquire the price of metallic oil and to find out how many gallons he needed (R. 64). Mr. Bowers was waiting on a customer and asked witness to wait a ...nute (R. 64-65). When Mr. Bowers finished with the customers he told witness someone had broken into the warehouse in back of the store, and wanted witness, who was a car-

penter, to fix it. Witness saw the place that was broken open and described it (R. 65). Witness was instructed how to repair the broken place by Mr. Bowers. Mr. Hoffman started on his repair work and while so engaged "heard a noise like a bulb had blown out, or a fuse and a noise like someone was in agony, hollering "Oh, oh", and I came on in and Mr. Bowers was laying in the aisleway and with his feet at the end of the counter at an angle like he was going to walk across the aisle instead of straight down the aisle (R. 66). (Sketches of the store are found at pp. 156A, 156B of the record.) Mr. Bowers' body was laying between the two counters running lengthwise of the store. He had apparently been shot while behind the counter and had come out, turned to his left and fallen with his head to the front of the store (R. 67-68). Mr. Bowers "was always jolly and cutting up" in the store. On the morning of his death he was the same as always. He did not seem despondent or melancholy on that day or the day before (R. 70). The reason witness did not hear a shot, he was in a room shut off from deceased, hammering (R. 74).

Mr. Samuel Del Vecchio stated that the manager of the Seventh Street Store who preceded Mr. Bowers, kept guns (R. 79). Mr. Bowers' accounts were in perfect condition, and had been so always (R. 79). Mr. Bowers "seemed to be very healthy and in good condition. He had had an operation on his ear and was permitted to leave the store to have his ear treated from time to time. Mr. Bowers "was well liked by all the customers, very jolly and he was a southern boy and he was so good, and he cracked jokes with everyone, and everyone liked him, and he increased the business of the store tremendously through his personality. He had a splendid personality. There was never any change in his disposition; "he was always

cheery and jolly" (R. 80). Mr. Del Vecchio did not give Mr. Bowers permission to keep a gun in the store, but "if he had asked, I certainly would have given it" (R. 82). It was customary for the managers of that particular store to have a gun there (R. 85).

MR. JOHN W. SHAVER lived in the same neighborhood as Mr. Bowers for four years and for one year or more of this time they lived next door to each other. He knew the Bowers family intimately. The families visited each other frequently. He saw Mr. Bowers practically every day (R. 120). Mr. Bowers was "bright, sunny, cheerful. I never knew him to be anything else." Deceased talked to Shaver from time to time; the last time, the evening before his death. Between 7 and 8 o'clock on the night before deceased's death, deceased came into witness' cellar, where there was a workshop, and talked "and laughed and joked and just had generally a good time" (R. 121). On that occasion Mr. Shaver requested deceased to bring him a pound of nails and three cans of paint from the hardware store of which deceased was manager. Deceased promised so to do. The general appearance, attitude and disposition of deceased was that he "was just about as happy and contented" as witness was. Mr. Shaver never knew deceased to be melancholy, depressed or downhearted. Mr. and Mrs. Bowers were "absolutely agreeable and happy." Deceased "thought the world" of his little son (R. 122). Deceased never complained to Mr. Shaver of any ailment (R. 125-6).

MRS. MARIETTA SHAVER had known deceased four years (R. 127). The Bowers family and the Shaver family went riding together, played tennis and croquet and visited each other frequently—four or five times a week (R. 127-8). Mr. Bowers died on the Thursday following Labor Day. On the latter date Mr. and Mrs. Bowers and Mr. and Mrs.

Shaver played tennis and croquet all afternoon. The disposition of deceased was "very happy; he was always smiling" (R. 128). Mr. and Mrs. Bowers "were very happy." Mr. Bowers was "just as fond as any father could be of the little fellow (his son), and the little fellow was crazy about his daddy" (R. 129). On the morning of Mr. Bowers' death, Mrs. Shaver heard "the machine when he came out to pick up a neighbor, I could hear him laughing" (R. 129). Mr. Bowers "never mentioned any trouble about his ear, only to say he may, some day, have to be operated on." He never did say he had any headaches, but witness knew "he did not have much trouble as far as she knew" (R. 130).

Mr. Odus Eiland lived about three blocks from Mr. Bowers, whom he had known for about ten years. They had been friends and visited their respective homes (R. 131-2). Mr. Bowers never appeared despondent or depressed. On the Sunday before his death, witness and deceased were at a Mr. Dunn's home, where they had ice cream and cake (R. 132) and Mr. Bowers "was the life of the party; he was cheerful as he could be, and jolly." Mr. and Mrs. Bowers got "along as well as any couple could; I never knew of any disagreements between the two." Mr. Bowers was "very fond of his child" (R. 133). Mr. Eiland saw Mr. Bowers from "one to three or four times a week from June until September, either at the Bowers or Eiland residence, or at the homes of friends. Mr. Bowers never mentioned any trouble with his ear (R. 134). Mr. Bowers never had headaches as a result of the condition of his ear within a year before his death, although deceased had had headaches before that time (R. 135). Mr. Bowers never spoke to witness of the necessity of an operation upon his ear (R. 136).

Mr. David Eiland had known Mr. Bowers all of his life and since he had married he "knew him very well" (R.

136). He had visited the Bowers' home and had worked for Mr. Bowers for eight or ten months at the Peoples Hardware Store at 18th and Columbia Road (R. 137). Mr. Bowers "never worried about anything." He was "cheerful, always." That condition continued until the last time witness saw Mr. Bowers, which was the Sunday preceding his death, at Mr. Dunn's, where Mr. Bowers made more fun than anyone else did." Mr. and Mrs. Bowers were "very happy" together (R. 138). Mr. Eiland "for the last four years" had "been around" Mr. Bowers "every day you might say, almost." They both worked at Peoples Hardware Stores (R. 139).

This comprised the testimony of the claimant. The respondents, Del Vecchio and the Insurance Company, who had "controverted" the claim for compensation then sought to prove Mr. Bowers a suicide.

Dr. James A. Smart was a graduate physician, specializing in the diseases of the ear, nose and throat. He was the attending physician of Mr. Bowers prior to his death (R. 29). Mr. Bowers first consulted the Doctor on August 24th, 1931. Dr. Smart was told by Mr. Bowers that deceased had had an operation on his left ear told in November, 1928, and since that time deceased had had a discharge from his left ear. Two months prior to his consultation Mr. Bowers had pain in his left ear (R. 30). The pain in the ear bothered Mr. Bowers at night; he could not sleep much. The examination disclosed a healed wound in the back of the left ear, and there was no discharge there. In the canal of that ear there was some pus having a very foul odor. The drum of the ear was gone and there was some granulation tissue present in the middle ear, which latter indicated a severe infection in the middle ear at that time (R. 31). The condition found in Mr. Bowers' ear very

often caused severe pain but also, quite often, there is no pain present at all. Dr. Smart supposed Mr. Bowers took the pain to be a headache. After the examination Mr. Bowers "did not seem particularly alarmed about his ear." Mr. Bowers informed the doctor that he was unable to pay for medical attention (R. 32). Whereupon the doctor, who was on the staff of the Episcopal Eye, Ear, Nose and Throat Hospital, sent him to the clinic in that hospital, where the doctor would see that he got an examination and as much treatment as is necessary without it costing you an awful price." The doctor saw Mr. Bowers several times at the hospital clinic. The patient was told that if the discharge in the ear persisted, an operation would be necessary, but he was not definitely told that there was another operation in prospect (R. 33). August 29th, 1931, was the last date Mr. Bowers received treatment for his ear (R. 38). It is possible that the ear had responded to treatment after that (R. 40). The treatment of the ear consisted of trying to find out what type of germ was causing the infection, the administration of antiseptic, the removal of the granulated tissue, sometimes cauterizing the middle ear and sometimes administering antiseptic powder, sometimes treating the nose and the administration of tonic and vaccine. The doctor could not say that the condition of Mr. Bowers was an aggravation to his nervous system. It could well be the source of great worry to him. It could have aggravated his nervous system (R. 41). Mr. Bowers "did not seem very worried about his ear." The doctor "could not say that he impressed me as being at all depressed" (R. 116). Mr. Bowers consulted the doctor "simply because it (the ear) was commencing to pain him" (R. 117).

Detective Sergeant Floyd A. Truscott was a member of the Metropolitan Police Force. He first saw Mr. Bowers'

body at Casualty Hospital. There he saw one wound in the front of the chest and one in back. The front wound was about two inches to the left of the midline and toward the left nipple. The wound in the back was closer to the midline or spine than the one in front (R. 88). The bullet had penetrated some paint cans opposite a drawer in the counter. The gun was found in the drawer (R. 89), the muzzle pointing toward the direction in which the drawer opened. The drawer was not entirely closed, but flush with the counter. The holster in the drawer lay in the opposite direction to the gun (R. 90). The "line of fire" of the gun could not be exactly determined. The bullet in the paint cans was a .32 caliber and about the height that it "would be in the man." The bullet took a level course. The shell was by the counter, toward the front of the store in some trays, about 12 feet distant. The gun was a .32 colt automatic and will throw a shell that distance. Such a gun ejects shells to its right, and if pointed at Bowers would have thrown the shell in that direction (R. 91). The ballistic tests showed the bullet and shell were fired through and in Mr. Bowers' gun (R. 92). There was blood on Mr. Bowers' shirt and something that looked like powder marks. Powder from a shell will stain at a distance of about 12 inches. From a .32 colt automatic at 12 inches the powder marks will be spattered covering an area about 3½ inches in diameter (R. 94). The stain on Mr. Bowers' shirt was very small in diameter, indicating the gun was fired at "practically point blank range" (R. 95). The gun could "go off" while you were taking out the magazine if your finger was on the trigger (R. 100).

Dr. Edwin Donaldson was the Police Department chemist and had training in powder marks on clothing, but only as to identification of the stain. He investigated the cause

of the stains on Mr. Bowers' shirts (R. 103). The top shirt contained particles of unburned powder above the upper right hand corner of the pocket. No powder stains were visible on the undershirt (R. 104). Witness "would not want to qualify" on how far away the muzzle of the gun was from the shirt when the shot was fired. To estimate that you would have to know the caliber of the gun, the charge of powder and whether it was an automatic or a revolver. Witness did not know all of these things. However, he said the gun, when fired, was approximately at a distance of two or three inches from the shirt. Mr. Bowers' shirt was charred, indicating the muzzle of the gun was not more than four or five inches distant therefrom when fired (R. 105). When a gun is fired at close contact, there is a small area of powder marks; "that area grows larger to a certain point and then recedes again" (R. 107).

Mrs. Thomas P. Mobley was waiting for Mr. Bowers to open the Seventh Street Store on the morning of his death. She went in to make a purchase (R. 108). She always talked to Mr. Bowers and "he always seemed to be a fellow that really enjoyed life some; more like he had everything to live for" (R. 109).

The testimony of Dr. Joseph D. Rogers was stipulated to be as follows: He performed an autopsy on Mr. Bowers who was about thirty years old, height 6 feet, weight 175 to 187 pounds. There was a bullet wound of entrance 3½ inches from the mid-line and 1½ inches above the left nipple, going through the chest, at about the same level, coming out 1½ inches from the left of the spine. There were eight small marks about the wound indicating powder burns. Death was due to a gunshot wound, hemorrhage and shock. The shot could have been fired by Mr. Bowers (R. 113). The bullet did not puncture the heart; it punctured the lung.

The wound was not such as to cause immediate death. Mr. Bowers could have moved after the shot took effect. He could have taken three or four steps. Mr. Bowers could have walked out from behind the counter after the shot (R. 114).

It was stipulated that the bullet from Mr. Bowers' gun was the cause of death (R. 146).

Detective Sergeant John C. Dalglish, of the Metropolitan Police, investigated the death of Jeff Bowers. He went to the Seventh Street store and the body had been removed when he arrived. (R. 147). The pistol was found in a drawer pointing to the back and behind a leather holster. The bullet was found in a can of paint (R. 148). He saw no evidence of cleaning a gun behind the counter (R. 149).

The testimony of Police Officer John B. Monroe for the petitioners was stipulated to be as follows: He was in a radio car and in response to directions went to the Seventh Street store where he saw the body of Mr. Bowers. It was in the rear of the store, face down, approximately at the end of the counter, where the cash register sets (R. 152).

ARGUMENT.

There is no question before this Court as to whether the deceased met his death by reason of an injury arising out of and occurring in the course of his employment.

That question was finally decided in favor of the respondent in the first appeal of this case (*Del Vecchio et al.* v. *Bowers*, 62 App. D. C. 327).

The only question before this Court is—Do the facts offered by petitioners before the Deputy Commissioner show the respondent's intestate to have been a suicide because such facts legally constitute "substantial evidence" sufficient to overcome the presumption of accidental death?

The respondent contends that as the statute (33 U. S. C. Sec. 920) provides that "substantial evidence" must be produced to overcome the presumption of accidental death, the Court of Appeals had a right to declare the evidence in this case to be of such character as to fail to support the Deputy Commissioner's findings.

Such action is not a disturbance of the Deputy Commissioner's findings of any one or all facts. It is a conclusion based on law and statutes that the facts produced were not of the kind or character as required by law or statute.

The Court of Appeals held that the finding of the Deputy Commissioner was not in accordance with the law. This does not constitute any novel proposition of law. It is as old as the compensation law itself.

After respondent filed her claim with the Deputy Commissioner, the employer and the insurance company "controverted" the claim and asserted that the claimant's deceased committed suicide (R. 27).

The issue before the Deputy Commissioner was whether deceased's death was accident or suicide. The claimant, appellant here, made out a case of accidental death and there was no "substantial evidence to the contrary." Indeed, there was no evidence of suicide whatsoever.

It is settled law that if there is any substantial evidence upon which a finding of a compensation commissioner can rest, such finding will stand. But such finding will not stand if it rests on surmise, conjecture or speculation.

Liberty Mutual Ins. Co. v. *Hoage*, 62 App. D. C. 189, 190;
Powell v. *Hoage*, 61 App. D. C. 99, 100;
In re Sanderson's case, 224 Mass. 558, 561, 113 N. E. 355;
In re Gorski, 227 Mass. 456, 459, 116 N. E. 811;
Legala v. *Jazek*, 170 Wis. 532, 536, 175 N. W. 87, 176 N. W. 238.

In New York the Compensation Statute (Sec. 68) provides that the rules of evidence of common law or statutory law shall not be binding upon the commissioner. It is verbatim the same as the first sentence in Sec. 23 (Tit. 33 U. S. C. Sec. 923).

In *Carroll* v. *Knickerbocker Ice Co.*, 218 N. Y., 435, 440, (113 N. E. 507), the court said that notwithstanding this provision:

> "There must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and the award must in fairness be set aside by (the) Court."

There is a Presumption Against Suicide.

It is settled law that there is a presumption against suicide. *Met. L. Ins. Co.* v. *Hogan* (C. C. A.) 63 F. (2) 654; *Wishcalless* v. *Hammond-Standish & Co.*, 201 Mich. 192, 166 N. W. 993; *Mass. Protective Assn.* v. *Cranford*, 137 Miss. 876, 102 So. 171; *Prentiss* v. *Ill. Life Ins. Co.*, (Mo.) 225 S. W. 695.

Where a person is found dead, the presumptions are that death was natural or accidental, in the absence of insanity, and suicide will not be presumed. *N. Y. Life Ins. Co.* v. *Turner*, 213 Ala. 286, 104 So. 643; *Manziano* v. *Pub. Service Gas. Co.*, 92 N. J. L. 322, 105 At. 484.

Where death may have resulted from suicide or accident, it will be presumed that it resulted from accident. *Postler* v. *Travellers Ins. Co.*, 173 Cal. 1, 158 Pac. 1022; *Wishcalless* v. *Hammond, Standish & Co., supra.*

The burden to prove suicide is on the one asserting it. *Travellers Ins. Co.* v. *Allen*, (C. C. A. 8) 237 Fed. 78, 150 C. C. A. 280; *DeBruen* v. *City of Bayard*, 124 Neb. 566, 247 N. W. 347.

The presumption against suicide stands until overthrown. *Guardian L. Ins. Co.* v. *Dixon*, 152 Ark. 597, 240 S. W. 25.

In *Wilkinson* v. *Stand. Acc. Ins. Co.*, 180 Cal. 252, (208 Pac. 607), in speaking of the presumption of accident rather than suicide, said, p. 256:

> "The contention that there is no such presumption (of accident) in this state cannot be sustained. This presumption necessarily and logically follows from statutory presumption 'that a person is innocent of crime or wrong.' (Code Civ. Proc. Sec. 1963, subd. 1; *Jenkin* v. *Pac. Mut. L. Ins. Co.*, 131 Cal. 121, 63 Pac. 780."

The presumption that death is due to accident and not to suicide applies to compensation cases. 5 A. L. R. 1680 (cases cited).

In *Manley* v. *Harvey Lumber Co.*, 175 Minn. 489, (221 N. W. 913) a finding by Industrial Commission denying compensation was reversed. The deceased used his automobile in his employer's business. On going to his garage to get the car, he was killed by monoxide gas. He was found in the garage with the engine of his car running. The court said 491:

> "This court has uniformly held that where the commission as the trier of the fact has a choice between conflicting evidence or diverse inferences may be drawn from the evidence, its conclusions should stand. *Smith* v. *Mason Brothers Co.*, 174 Minn. 94, 218 N. W. 243. If, however, the conclusions reached by the commission are manifestly and clearly contrary to the evidence, they cannot stand. *Campbell* v. *Nelson*, 175 Minn. 51, 220 N. W. 401.
>
> "* * * From the evidence, it is certain that Manley went to the garage for the purpose of starting out with his car on a collection trip into the country on his employer's business. He had started the motor for this purpose. The placing of a spare tire on the car was a proper and necessary precaution for the work

intended. The tools found were usually used for that purpose. The accident arose out of and in the course of his employment."

"The suggestion made in respondent's brief that it might have been a case of suicide finds no support in the record. Furthermore, the presumption is to the contrary. *State ex rel Oliver Iron Mining Co.* v. *Dist. Court,* 138 Minn. 138, 164 N. W. 582."

Section 20 of the compensation act is a re-statement of the common law.

It is respectfully submitted that the very best that can be said for petitioners' case is that the evidence of suicide or accident balance. In such event, the courts must find in favor of accident. *Milwaukee Fuel Co.* v. *Indus. Com.,* 159 Wis. 635, 644, 150 Nev. 998, 1000; *Oliver Iron Mining Co.* v. *Dist. Court,* 138 Minn. 138, 140, 164 Nev. 582, 583; *Travellers Ins. Co.* v. *McConkey,* 127 U. S. 661, 667; *Standard L. & Acc. Ins. Co.* v. *Thornton,* (C. C. A. 6) 100 F. 582, 587.

Suicide will not be presumed from a violent death. *St. Louis Ins. Co.* v. *Roper* (C. C. A. 5), 44 F. (2d) 897, 898; *Standard Acc. Ins. Co.* v. *Kiker,* 45 Ga. App. 706, 165 S. E. 850, 851.

The presumption of accident must be overcome by evidence. *Milwaukee Fuel Co.* v. *Indus. Com.,* 159 Wis. 635, 645, 150 N. W. 998; *Wilkinson* v. *Aetna L. Ins. Co.,* 240 Ill. 205, 212, 214, 88 N. E. 550, 25 L. R. A., N. S., 1256, 130 A. J. R. 269.

The compensation commissioner is by law required to follow this rule. *Bekkedal L. Co.* v. *Indus. Com.,* 168 Wis. 230, 233, 169 N. W. 561.

The petitioner had the burden of proving suicide and had to produce evidence sufficient to overcome the presumption of accidental death. *Measha Woodmen Co.* v. *Indus. Com.,* 187 Wis. 21, 22, 203 N. W. 906; *N. Y. Life Ins. Co.* v. *Brown* (C. C. A. 5), 39 F. (2d) 376, 378.

Even though there is direct evidence that death followed from the infliction of a wound from a weapon found in the hand of decedent, such evidence does not overcome the presumption of accident. *Mutual L. Ins. Co.* v. *Hatten* (C. C. A. 8), 17 F. (2d) 889, 890; *Farmer's Grain & Sup. Co.* v. *Blanchard*, 104 Neb. 637, 640, 178 N. W. 257; *Sparks Milling Co.* v. *Indus. Com.*, 293 Ill. 350, 353, 127 N. E. 37; *Westman's Case*, 118 Ne. 133, 140, 100 At. 532; *Mut. L. Ins. Co.* v. *Ford* (Tex. Ct. App.), 130 S. W. 769, 778; *So. Atl. Ins. Co.* v. *Hurt*, 115 Va. 398, 401, 79 S. E. 401.

In this class of case, it is presumed that if decedent could speak, "he would give a reasonably satisfactory account of himself as to the matters which might not otherwise be understood." *O'Sullivan* v. *A. Howards Theatre Co.*, 187 N. Y. S. 64, 66, 195 App. Div. 609; *Graff* v. *Art Color Printing Co.*, 191 App. Div. 69, 181 N. Y. S. 707; *Mullen* v. *Schenectady Rwy. Co.*, 214 N. Y. 300, 305, 108 N. E. 412.

There was no duty on respondent "to negative the possibility of suicide." *Rideout Co.* v. *Pillsbury*, 173 Cal. 132, 134, 159 Pac. 435, 436.

Before the Court can determine that the evidence proved suicide, there must be more than an inference to support that theory. The "Evidence must compel the inference" of suicide in order for the Court to say that deceased was a suicide. *Simmons Co.* v. *Indus. Com.*, 211 Wis. 445, 448, 248 N. W. 443.

In a compensation case, where the evidence shows that deceased "was in good health and possessed of his faculties; 'he was smart'; generally faithful, considerably experienced; and possessed of knowledge of perils," etc., such evidence "precludes, *inter alia*, mere inference of suicide". *Malley* v. *Union Indem. Co.* (Tex. Com. App.), 12 S. W. (2d) 1002, 1005.

"Mere suspicion cannot be made the basis for a judicial pronouncement that such (suicide) was the fact." *Hershey* v. *Agnew*, 83 Colo. 89, 93, 267 Pac. 526.

There must be "clear proof" of suicide. *Silva* v. *Fid. & Cas. Co.*, 272 Mass. 328, 330, 147 N. E. 858.

Every reasonable hypothesis of accident must be excluded. *Beers* v. *Calif. St. L. Ins. Co.*, 87 Cal. App. 440, 226 Pac. 380, 392; *Goodbar* v. *L. Ins. Co.*, 89 W. Va. 221, 226, 108 S. E. 896.

The rule as to the sufficiency of evidence to overcome the presumption of accident is different in different States. Whatever the rule is in any of the following jurisdictions, the petitioners did not meet it in this case.

In Virginia, to overcome the presumption of accident, the evidence of suicide must be such as to overcome the presumption of innocence. *Mut. Ins. Co.* v. *Marshall*, 157 Va. 427, 429, 161 S. E. 61; *Life Ins. Co.* v. *Hairston*, 108 Va. 852, 62 S. E. 1057, 1066, 128 A. L. R. 989; *So. Atl. Ins. Co.* v. *Hurt*, 115 Va. 398, 401, 79 S. E. 401.

This rule is followed in the 4th Circuit Court of Appeals: *Tabor* v. *Mut. L. Ins. Co.*, 13 F. (2d) 765, 769; *Fed. Mut. L. Assn.* v. *Miller*, 92 F. 63, 70; *Parrish* v. *Order of United Com. Trav.*, 232 F. 425.

The rule in Minnesota requires a "fair preponderance" of the evidence to overcome the presumption of accident. *O'Conner* v. *Modern W. of A.*, 110 Minn. 18, 24, 124 N. W. 454; *Lindahl* v. *Sup. Ct. I. O. O. F.*, 100 Minn. 87, 96, 110 N. W. 358.

The "great preponderance" of the evidence is required before the presumption of accident is overcome in the courts of Missouri 152 Mo. App. 155, 166, 133 S. W. 153.

Where the evidence of suicide is circumstantial, the Missouri, Louisiana, Virginia and Illinois Courts require that such evidence must exclude any hypothesis of accident with

reasonable certainty. *Reynolds* v. *Casualty Co.*, 274 Mo. 83, 96, 201 S. W. 1128; *Faulk* v. *Mut. L. Ins. Co.*, 160 La. 529, 543, 107 So. 395; 46 La. 1189, 1520, 388, 24 L. R. A. 589, 49 A. L. R. 348; *So. Atl. Ins. Co.* v. *Hurt*, 115 Va. 398, 401, 79 S. E. 401; *Sweney* v. *N. W. Mut. L. Ins. Co.*, 251 Ind. App. 1, 24 *et seq.*

The proof of motive for suicide merely weakens the presumption against it, and is insufficient to establish suicide. *Sweney* v. *N. W. Mut. L. Ins. Co.*, 251 Ind. App. 1, 24.

Even if motive for suicide is proved and there are other circumstances in the case "probably indicating suicide", such evidence is insufficient to establish suicide if there is "equal probability that the death was accidental". *Mut. L. Ins. Co.* v. *Carroll* (C. C. A. 6) 17 F. (2d) 42, 43.

The statutory presumption of accident is binding on the Deputy Commissioner and on the courts. It is conclusive upon both. No evidence is required to prove accident. *J. F. Hardymon Co.* v. *Kaze*, 241 Ky. 252, 255, 43 S. W. (2) 678; *Peters* v. *Cal. Bldg. Loan Assn.*, 116 Cal. App. 143, 2 Pac. (2) 439, 442; *South* v. *Benjamin B. Wright Co.*, 250 N. Y. S. 56, 58, 232 App. Div. 343; *Matter of Shearer*, 242 N. Y. 73, 150 N. E. 604, 605; *Martin* v. *Sanatorium*, 200 N. C. 221, 225, 156 S. E. 849; *Employers L. Assurance Corp.* v. *Indus. Acc. Com.*, 92 Cal. App. 119, 267 Pac. 922, 924; *Elec. & P. Co.* v. *Place*, 150 Va. 562, 566, 143 S. E. 756; *Farmers G. & S. Co.* v. *Blanchard*, 104 Neb. 637, 178 N. W. 257; *Simmons* v. *Indus. Com.*, 211 Wis. 445, 448, 248 N. W. 443; *Rockwood Ala. Stone Co.* v. *Lawler*, 223 Ala. 336, 337, 135 So. 569; *Wise-Buchanan Coal Co.* v. *Ray*, 157 Okl. 197, 199, 17 Pac. (2) 360.

All of the pertinent facts in this case are undisputed:

1. Mr. Bowers was always jolly and fond of life (all of respondent's witnesses and two of petitioners' witnesses so testified).

2. Mr. Bowers had an ear infection which petitioners' doctor said did not seem to worry Mr. Bowers. He was not worried over his health.

3. Mr. Bowers had several hundred dollars in the bank and owed only $160.00.

4. Mr. Bowers' business accounts were in perfect order, and he was "building up" his commissions and income right along.

5. Mr. Bowers' family conditions were excellent and he was fond of his small son.

6. The night before his death Mr. Bowers promised to bring a neighbor some supplies on the night of the day he died.

7. The night before he died Mr. Bowers wrote to his mother saying he would not "wait so long (to write) next time" and asking his mother to "answer soon in a long letter". (This letter was evidently posted on the morning of his death.)

8. Mr. Bowers was not shot through the heart, but about two inches above it.

9. Mr. Bowers was shot by a bullet from his own pistol, which was kept in the store of which he was manager, for the protection of himself and his employer's goods.

Where the pertinent facts stand undisputed the rule is:

> "* * * The claimant is entitled to all reasonable inferences from such undisputed facts in support of her claim, as would be accorded to her upon a demurrer to her evidence. *Poccardi* v. *Public Service Commission*, 75 W. Va. 542, 84 S. E. 242; *Goble* v. *Compensation Commissioner*, 111 W. Va. 404, 162 S. E. 314; *Demastes* v. *Comp. Com'r*, 112 W. Va. 498, 501."

Facts Disputed.

Petitioners' brief, pp. 19, 20.

1. The impeachment of *one* of respondent's witnesses by proof that before the hearing he had said the deceased

was despondent and at the hearing, when under oath, said he was jolly, etc.

That is proof of no fact. It is admitted only to affect the credibility of the witness who was impeached.

Eight witnesses, including two called by petitioner (one of whom was the petitioner, Del Vecchio) supported respondent's contention that deceased was jolly, gay and very far from being depressed or despondent.

It is respectfully submitted that that is a mole-hill mountain.

2. The letter of deceased to his mother.

A reading of the letter as an entirety clearly shows it does not support petitioners' theory in the slightest.

Conclusion.

With respondent's evidence in the case, and the burden of proving suicide being on the petitioners, "Substantial evidence" there means evidence of enough weight to overcome the presumption of accidental death *and* respondent's evidence.

It is submitted that such "substantial evidence" is lacking and the Court of Appeals properly so ruled.

The Petition should be denied.

Respectfully submitted,

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Service of copy acknowledged this 16th day of May, A. D. 1935.

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